Supreme Court, U. S.
FILED
OCT 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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APPENDIX 1a

IN THE

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SECOND SUPPLEMENTAL BRIEF FOR RESPONDENTS

INTRODUCTORY STATEMENT

On October 5, 1974 the Solicitor General filed an *amicus curiae* brief in this case. The Government's position, as stated in that brief, is that if any process is due to persons held in physical custody prior to trial

upon an information, the obligation is met by prosecutorial screening, bail hearings and expedited trials.

This, the third brief filed by the Respondents, focuses upon the Government's contentions. Our previous efforts have illustrated that a host of recent decisions compel the conclusion that the Respondents' claim to an opportunity to be heard after arrest but prior to trial is strong. Indeed, a comparison of the interests involved in this claim and those involved in *Mitchell v. W.T. Grant Company*, ____ U.S. ____, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); *Morrissey v. Brewer*, 408 U.S. 471 (1972); and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) compel the inescapable conclusion that persons held in jail solely upon a prosecutor's information have the strongest claim to a hearing. The Appendix to this Brief contains a chart which makes the comparison leading to that conclusion.

Faced with the recent due process decisions, the Government contends that they do not require a "formal procedure" to determine probable cause. Thus they present their prosecutorial screening, bail hearing, expedited trial trilogy as sufficient to meet due process standards. In doing so, the Government has overlooked the essential meaning of due process.

At the least due process, even in a preliminary inquiry, requires notice, an opportunity to confront and cross-examine adverse witnesses and the right to be heard by a neutral and detached person. *Morrissey v. Brewer*, 408 U.S. at 488-489. Against the most

minimum application of that standard, the Government's suggestions must be rejected.

In part one of this Brief we will demonstrate the deficiency in the Government's tripartite "hearing" procedure. Thereafter we will show that no rationale exists for denying an opportunity to be heard to misdemeanant defendants who are in jail awaiting trial. And finally, we will show that neither history nor the prior decisions of this Court justify the use of an unreviewed information to take a presumably innocent person's liberty without an opportunity to be heard.

I.

PROSECUTORIAL SCREENING, BAIL HEARINGS AND EXPEDITED TRIALS DO NOT, EITHER SINGLY OR IN SUM, MEET THE REQUIREMENTS OF THE RIGHT TO BE HEARD BY A NEUTRAL AND DETACHED PERSON COMMANDED BY THE DUE PROCESS CLAUSE.

A. Prosecutorial Screening Denies an Opportunity to be Heard.

The Respondents have consistently pointed out that an affirmance in this case would not diminish the prosecutor's role as the primary screening force in the decision to charge process. Respondents' Supplemental Brief 22-23. It would merely require a subsequent judicial review of the decision in a proceeding meeting due process requirements.

The reason for judicial oversight is simple. The prosecutor reviews the case brought by a complaining party, generally the police. He arrives at his conclusion based upon what the police present him. His ability to carefully determine probable cause is limited by the kind of information he receives. Even if a prosecutor is, as the Government asserts, naturally disinclined to prefer weak charges,[1] he has no real opportunity to test or verify the facts in the *ex parte* setting of his inquiry. Thus the best intentioned prosecutor may, because of the nature and manner of the information presented to him, find himself committed to an ill-founded prosecution.[2]

[1]While we do not question the general good faith of prosecutors, one cannot fail to recognize that factors other than wanting to win a case go into the decision to charge. Lewis R. Katz in *Justice is the Crime, Pretrial Delay in Felony Cases*, (1972), commenting upon the delicate balance in police-prosecutor relationships wrote:

> "Since both [offices] are working towards the same general goals, each is dependent upon the other's labors to facilitate its own work. As a result, prosecutors are fully aware that they cannot often refuse a police request to prosecute, and the police are aware that they cannot pressure for prosecution in too many questionable cases, for it is the prosecutor who ultimately must justify that decision in court."

Popularly elected prosecutors, like the Petitioner, also face political considerations which may affect their independence. These are also relevant factors in determining neutrality and detachment. See Point "B", *infra*.

[2]The record in this case is illustrative of that point. An assistant state attorney prepares an information after a complaining party or police officer comes into his office and talks to him. The information is reviewed by the Chief of the Complaint Division and forwarded to the State Attorney or one of his designated assistants for signature. App. 49-50. The Petitioner's Caseload Report for the Year Ended December 31, 1970 reflects that of the 7856 "disposed" felony and misdemeanor cases there were 1373 acquittals and 194 nol prosses. App. 62. If one excludes the 1373 categorized as "Other (Absentee Docket, etc.)" which were really not resolved, App. 62, approximately 16% of the prosecutions failed. These statistics do not reflect the number of cases in which an information "overcharged" a defendant. Since bond is set on the charge contained in an information, overcharges often result in unfair deprivations of pre-trial liberty which could be avoided by a preliminary hearing.

An opportunity to be heard subsequent to arrest would ameliorate the problems which always flow from ex-parte decisions. Justice Frankfurter stated:

> "... fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it is reached. Secrecy is not congenial to truth seeking and self righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it...."
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (concurring opinion).

Prosecutorial screening cannot provide that opportunity. A subsequent judicial hearing can. Judicial review serves as a check and balance upon police-prosecutor initiation of charges. That concept is recognized by commentators, Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 433 (1960) and by this Court:

> "... A democratic society, in which respect for the dignity of all men is central, naturally guards

against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the over-zealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. . . ."

McNabb v. United States, 318 U.S. 332, 343-344 (1943).

In response the Government argues that the screening process is so efficient that providing preliminary hearings would generally be a waste of time. Government Brief 41. They cite data showing high federal conviction rates and low state preliminary hearing dismissal rates to buttress their contention. Government Brief 41, n. 35; 67. However, their argument fails as a matter of law. Added to that, their statistics are suspect[3] and atypical.[4]

[3]Reliance upon the 97% conviction rate alluded to in *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) is inappropriate. That figure reflects felony prosecutions which must be commenced by indictment. Misdemeanor information cases in the federal system are, for the most part, unique to the District of Columbia. Government Brief 3-4. The 93% misdemeanor conviction rate in the District of Columbia excludes the 14% of charged persons whose cases are dismissed after completion of pre-trial diversionary programs. Some concern has been voiced that those programs encourage innocent people to waive their right to be heard. Goldberg, "Pre-trial Diversion: Bilk or Bargain?", 31 *NLADA Briefcase* 490, 499 (1973) And there is also reason to believe that persons incarcerated prior to trial are more likely to be convicted than those who were released. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). See also Amicus Curiae Brief of The National Legal Aid and Defender Association 9-10. Consequently a denied preliminary hearing, insofar as it might have foreclosed pre-trial release from physical custody by making a bail hearing meaningful (see discussion *infra*), may contribute to the high conviction rate.

Seeking to deny preliminary hearings because few persons obtain dismissal then or at trial is but one step from the argument that we ought to consider foregoing trials because few are acquitted. That kind of logic has been rejected long ago:

"To one who protests against the taking of his property without due process of law, it is no answer that in his particular case due process of law would have led to the same result because he

[4]The F.B.I.'s *Uniform Crime Reports for the United States*, 1973, show that of those charged with violent crimes, 32% were acquitted or had their charges dismissed; 12.7% were found guilty of lesser offenses and 3.2% were found guilty of the offense charged. Of those charged with property crimes, 14.9% were acquitted or had their charges dismissed; 5.0% were found guilty of lesser offenses and 34.8% were found guilty of the offense charged. Miscellaneous offenses ranging from "other assaults" to drunkenness and disorderly conduct reflect acquittal rates from 44.1% to 9.4%. The highest conviction rate in the lesser crime category was in drunkenness cases (88.2%). The single largest group other than drunkenness was a category called "All other offenses". Only 51.4% of those people were found guilty of the offense charged. *Id.* Table 18, p. 116.

The Government also errs in attempting to measure the usefulness of preliminary hearings only by the number of dismissed cases. First there is evidence that large numbers of cases are dismissed at preliminary hearings. Respondents' Brief 34.-35. Second, the benefits which flow from such an adversarial hearing extend beyond dismissal to informed decisions on bail, psychiatric treatment, and reduction of charges. *Coleman v. Alabama*, 399 U.S. 1 (1970).

had no adequate defense upon the merits. . . ."

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

Due process guarantees not only the right to be heard, but the right to be heard by a neutral and detached person. The prosecutorial screening process fails to meet that test too.

B. The Prosecutor is Not Neutral and Detached.

The concept of "neutrality and detachment" is found in the Fourth Amendment and in the Due Process Clause. Compare *Shadwick v. City of Tampa*, 407 U.S. 345 (1970) with *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

The Government seeks to avoid the implication of the Fourth Amendment cases, *Shadwick* and *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), by saying that a prosecutor issuing an information is not an investigative officer and thus does not fall within Fourth Amendment proscriptions. Government Brief 38. Yet, a few pages later, they say preliminary hearings are valueless because "both prosecutors and defense counsel have had too little time to investigate their case. . . ." Government Brief 44, n. 39. That statement recognizes the duality of the prosecutor's role.[5] Once he has decided to file an information based upon the

[5]It also recognizes the shortcoming of the screening process. One would hope that a prosecutor would have investigated a case prior to filing. But the *ex parte* charging process precludes that protection.

police report he then becomes inextricably entwined with the investigative function necessary to build the case. Since we are not asking for a hearing *prior* to the filing of an information it is of little consequence that he has generally been uninvolved up to the time the police officer presents himself.[6] But once the information is filed, a function which we would not deny a prosecutor, it cannot be said that the continued loss of liberty which results solely from his signature is being accomplished by a neutral and detached party.

In *Shadwick* a unanimous Court wrote:

> "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality or affiliation of these [municipal court] clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires."

Shadwick v. City of Tampa, 407 U.S. at 350.

Clearly, prosecuting officials cannot make the same claim to neutrality and detachment.[7]

[6]There are many instances when the prosecutor's office initiates and supervises an investigation. When he has accumulated evidence which he believes establishes probable cause, he files an information. The Government takes no cognizance of this multi-purpose role of a prosecutor which completely negates their characterization of the prosecutor as an accusative officer and not an investigative officer.

[7]The due process standard requires an "independent" decision maker. *Morrissey v. Brewer*, 408 U.S. at 486. The Fourth Amendment cases are instructive for they define neutrality and detachment and in the context of this claim provide an insight into "independent". For the reasons that a state attorney runs afoul of the Fourth Amendment standard, he cannot be "independent" under the Due Process Clause.

Even if one could say that a prosecutor were neutral and detached in Fourth Amendment or due process terms, the heart of the Respondents' case would be unaffected. For our claim is not that the initial taking is invalid, (Respondents' Brief 13; Tr. of Oral Arg. 54-55), but merely that the taking without a later opportunity to be heard is invalid. This is a Fourteenth Amendment Due Process claim. Since we have already shown that prosecutorial screening affords no opportunity to be heard, whether a prosecutor is neutral and detached is important only insofar as it underscores the total lack of protection afforded to a person incarcerated upon an information.[8] We submit that the prosecutor's function makes it inappropriate for him to claim that he is so impartial that a judge may not inquire into his determination of probable cause.

C. Bail Hearings Do Not Provide the Opportunity to Be Heard On the Question of Probable Cause and Even if Release from Custody were the Issue in This Case, Such Hearings are Irrelevant to Those Charged with Non-Bailable Offenses and the the Indigent.

This case does not present the question of whether the Respondents are entitled to be at liberty upon bail.

[8] An additional consideration is found in the Fifth Circuit's view that "even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system" compromises any argument that a state attorney is sufficiently neutral, detached or independent to be the sole arbiter of probable cause. *Pugh v. Rainwater*, 483 F. 2d at 778.

The Government's effort to transform the issue into one of bail misses the point of this litigation. It poses the issue of whether defendants charged upon informations have a right to be heard prior to trial. The fact of physical custody is important only because in balancing due process claims, one consideration is the quality of the deprivation. Here it is the total taking of absolute liberty. If the Respondents had been released upon bond they would not have been foreclosed from claiming a denial of the right to be heard. A different consideration would merely be present when a court balanced the competing interests in assessing the due process claim.

For Pugh and the class he represents, bail hearings are a totally irrelevant proposal. Pugh was charged with robbery, a "life" offense which requires that bail be denied unless *he* showed that the proof of guilt was not evident nor the presumption that he committed the crime great. *Loper v. Stack*, 291 So. 2d 207, (4th D.C.A. 1974). The information not only denies a preliminary hearing, it denies bail.

Against that background we consider the utility of the bail hearings suggested by the Government to see if they can ever provide the rights asserted by the Respondents.

In the Florida system bail hearings do not provide for an opportunity to test probable cause. *Pugh v. Rainwater*, 483 F.2d at 781, n. 8. Of course, the filing of an information would preclude such an inquiry. *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972). An information filed against a misdemeanant in the federal system would likewise preclude a probable

cause inquiry. Rule 5(c), Federal Rules of Criminal Procedure.

While the "weight of the evidence against the accused" (18 U.S.C. Sec. 3146(b)) is a federal consideration in setting bail, it is a far cry from being what the Government calls the "functional equivalent of the (preliminary) hearing". Government Brief 52. The difference is a matter of form and substance.

The bail hearing provides no opportunity to confront, cross-examine or present evidence on the question of probable cause. At best it is an informal inquiry into the case and the prosecutor's view of the strength of it. The defect in the decision to charge process infects the prosecutor's response and destroys the contention that the bail hearing provides a safeguard against improvident prosecutions. The prosecutor's view of his case is one-sided. He conveys that to the court either orally or by the affidavit procedure the Government suggests. There is no opportunity to effectively confront that kind of presentation. The bail hearing merely perpetuates the denial of the opportunity to be heard.

That ongoing failure makes the decision on bail itself suspect. Providing the opportunity to be heard on the question of probable cause would improve fairness in bail decisions. This Court has recognized the usefulness of preliminary hearings in setting bail. *Coleman v. Alabama*, 399 U.S. 1 (1970). Given the long lament of legal scholars over the bail system,[9] one wonders if the

[9]See Goldfarb, *Ransom* (1965); Kasanof and Single, "The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City", 8 Crim. L. Bull. 459 (1972); A Program for Prison Reform in the United States, Final Report of the Annual

Government should not be arguing for preliminary hearings in order to make bail decisions more informed for the sake of society as well as defendants.

Any doubt about the Government's attempt to circumvent the right to be heard via bail hearings is resolved by considering the available recent statistical data on the utility of bail. In mid-year 1972, the total local jail population in the United States was approximately 141,600 persons. Of that number, 50,800 were awaiting trial. Thirty thousand five hundred were in other stages of adjudication, including some who were arrested but not yet arraigned. Of the awaiting trial group, approximately 5,700 were charged with minor offenses including traffic, drunkenness, petit larceny and simple assault. The average delay for those awaiting trial was three months. Nearly 50% of the total number of persons incarcerated were held in the jails of six states: Florida, California, Texas, New York and Pennsylvania.[10]

Chief Justice Earl Warren Conference on Advocacy" (1972). Recommendation XI of that report included these views:

> "The presumption of innocence should pervade our system of criminal justice at all pre-conviction stages. But our present bail and release on recognizance systems do violence to that principle and are discriminatory and arbitrary . . . (U)nder our present practices half or more of accused persons are detained in jail pending trial."

[10]See: *Survey of Inmates of Local Jails; Advance Report.* United States Department of Justice, National Law Enforcement Assistance Administration, National Criminal Justice and Statistic Service, Table B. p. 17, and text pp. 5-6 (1974). An earlier report, the *1970 National Jail Census*, United States Department of Justice, National Law Enforcement Assistance Administration, National Criminal Justice Statistic Service at pp. 3 and 10 (Table 2) (1971), reflected that Florida was one of the six states which held over half of all the pre-trial detainees.

According to the Government, 15 to 20% of those charged with misdemeanors in the District of Columbia are unable to make bail pending trial. Government Brief 4. They remain incarcerated for substantial time periods. Government Brief 47-48 n. 41.[11]

Neither federal nor state bail hearings provide the chance to be heard on the issue of probable cause. That denial, to one who is presumed innocent and deprived of his absolute right to liberty, makes the hearing meaningless in the due process context posited by this case. The hearing is certainly devoid of value to people who, like the Respondents, are either not entitled to bond or cannot afford the bail set. App. 6, 10, 31. Thousands of people in the state and federal systems share those problems. The bail system has been of limited use in securing the right to release pending trial. It is useless in securing the right to be heard on probable cause. *State ex rel. Hardy v. Blount, supra;* Rule 5(c), Federal Rules of Criminal Procedure.

D. Expedited Trials and Calendar Control are Not a Valid Response to the Denial of an Opportunity to Be Heard Prior to Trial.

The expedited trial part of the trilogy proposed by the Government is the relief to be afforded if all else

[11]One of the Government's statistics is of limited value. It shows that 60.8% of the cases are disposed of betweenn zero and 45 days. But we have no way of knowing how many in that group are tried near the end of the 45-day period. What is clear is that over 14% are not tried within 90 days. Government Brief 48.

fails. But it comes too late. What difference does it make if a defendant is tried in 30, 60 or 90 days if he should not be tried at all? The probable cause hearing focuses upon the issue of whether trial is appropriate. The expedited trial does not address that consideration, which for a person presumed to be innocent, is an important one.

Moreover, there is evidence supporting the proposition that preliminary hearings will encourage speedy trials. The record in this case, reflecting a 20-25% decrease in the felony court caseload, shows that preliminary hearings, by dismissing cases, reducing charges and accepting pleas, aids in attaining that goal.

The length of pre-trial incarceration for jailed misdemeanants in the District of Columbia is already long without preliminary hearings. The Government can only speculate on the impact that preliminary hearings would have. The Solicitor General's pessimism may be unfounded. In any event, the Government forgets that an escape valve exists if they find preliminary hearings intolerable. They may indict instead of using an information. Indeed, the alarm sounded by the Government is even too shrill for the state system. They too may indict.[12] Whether such a response would run afoul of due process arguments similar to those made here is a question for another day. (See Tr. of Oral Arg. 60.)

The point is that preliminary hearings may expedite, not retard, criminal proceedings. But no matter the

[12]The option of indictment also provides an alternative for those who fear that the cost of providing due process is too great. That is discussed *infra.*

effect, rushing to trial is no response to this due process claim. The Government plan would pose a grisly Hobson's choice for incarcerated defendants: give up your preliminary right to be heard or face immediate trial even if you are not ready. That may not even be fair to the Government if they have not completed their investigation.

What is apparent throughout the Government's Brief is concern for the cost of providing preliminary hearings. The expedited trial suggestion is part of that concern and so we turn to that consideration.

E. Considerations of Cost and Efficiency Do Not Bar the Respondents' Claim.

Problems of cost and efficiency are not new responses to constitutional claims. This Court has answered by saying:

> "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell v. Burson, supra*, at 540-541; *Goldberg v. Kelly, supra*, at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois, 405 U.S. 645, 656."
>
> *Fuentes v. Shevin*, 407 U.S. at 90 n. 22. See also *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

Those thoughts are especially appropriate to the taking of liberty involved here.

It costs are to be measured at all, they may be offset by the positive attributes of preliminary hearings. Reduced jail populations resulted from the initial *Pugh* decision and the implementation of a local preliminary hearing plan. *Pugh v. Rainwater*, 355 F. Supp. at 1291; App. 109. Added to those savings are the cost of human misery which may be alleviated by a preliminary hearing. Consider the description of one relatively recent inmate of the District of Columbia jail:

> "The first night we were very impressed with the D.C. jail. It was always around 100 degrees and you dripped sweat. At nine or ten o'clock they put the lights out, and for a whole hour persons just screamed at each other and the guards and everything else. It's like something out of Dante – screams, cursing and so forth. I asked one of the old-timers and he said it is like this every night – just letting off steam like the hour of frustration."
>
> *Harper's Magazine*, October 1974, pp. 56-57.

Since most jailed federal misdemeanant defendants reside in the District of Columbia jail, it is appropriate

to turn to the Government's request that any requirement for preliminary hearings be confined to felony cases.

II.

INCARCERATED PERSONS CHARGED WITH MISDEMEANORS BY A PROSECUTOR'S INFORMATION ARE ENTITLED TO A PRELIMINARY HEARING.

A person held for trial upon a misdemeanor charge is deprived of his liberty as surely as a felony defendant. The jail cell looks the same to each. While the Constitution may call for different methods of initiating felony and misdemeanor prosecutions, the Due Process Clause draws no bright lines around one kind of lost liberty. It is disingenuous to suggest that a misdemeanant's pre-trial liberty is less valuable than a felony defendant's. The Court has recognized the harm which flows from any incarceration. *Baldwin v. New York*, 399 U.S. 66, 73 (1970); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

The same principles which require a hearing for jailed felony defendants apply to jailed federal misdemeanor defendants. Since misdemeanor trials do not occur quickly in the District of Columbia, the National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, Commentary to Standard 4.3 (1973) is no defense.[13]

[13]The Commentary views the preliminary hearing's protection against an unjustified trial unnecessary if a quick trial occurs in misdemeanor cases. Dade County, Florida, is attempting to meet that goal. Brief for Respondents, 25, n. 15. The Federal system apparently cannot. Government Brief 47-48, n. 41.

The vast bulk of misdemeanor prosecutions do not involve pre-trial or post-trial incarceration. The Government's fear that 15-20% of the four to five million misdemeanor prosecutions in the country would require preliminary hearings, Government Brief 46, n. 40, is unfounded. The statistics regarding the number of people in local jails awaiting trial, *supra*, should allay that trepidation.[14] See also Brief for Respondents 26, n. 16.

The request to exclude jailed federal misdemeanor defendants from preliminary hearing requirements should be rejected. It is constitutionally incongruous to prohibit one day of incarceration after trial unless a lawyer is provided or properly waived (*Argersinger*), but on the other hand condone lengthy pre-trial incarceration without a hearing.

III.

NEITHER THE PRIOR DECISIONS OF THIS COURT NOR HISTORY JUSTIFY THE DENIAL OF A PRELIMINARY HEARING TO PERSONS INCARCERATED UPON INFORMATIONS.

A. The Prior Decisions.

The Respondents have always begun their arguments by analogizing this case to the recent decisions which

[14]The figures showing the number of people who do not benefit from bail hearings in any way do not reflect the number of preliminary hearings which might be required under the facts of this case. Many of those awaiting trial were indicted, a process not under scrutiny here. The fact that only nine states filed amicus curiae briefs, and only one of those, Washington, shares the Florida process, attests to the limited impact an affirmance will have on the criminal justice system. In the federal system some 1300 cases would be affected. Government Brief 4.

involved similar, but less important, deprivations of liberty or property. The Petitioners and those supporting their position see their strongest support in *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914). Those, and other cases have already been analyzed by the Court of Appeals, by us, Respondents' Brief 27-30, and in the amicus curiae brief of the National Legal Aid and Defender Association.[15] Fairly read, they do not counter the arguments we advance.[16]

Here we merely reiterate that the issue of preliminary hearings prior to arrest is not presented. The provisional remedy of arrest, which is necessary to enable a court to assert its jurisdiction over a defendant for subsequent

[15]We would add to the NLAD Brief by submitting that *Costello v. United States*, 350 U.S. 359 (1956) and *Lawn v. United States*, 355 U.S. 339 (1959) focus upon considerations much different from those presented here. Thus, their dicta, even though it does not bar our claim, is of limited value.

[16]If by some stretch of logic it could be said that those cases in any way determine the contemporary claims of this case, the adage "Law must govern life, and the very essence of life is change" is a thought worthy of consideration. Pound, *Criminal Justice in America* 36 (1930). So too is Justice Pitney's comment, responding to an argument that due process is immutable:

> "... to hold that such a characteristic [immutability] is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

Hurtado v. California, 110 U.S. 516, 529 (1884).

trial is unaffected by a subsequent judicial determination of probable cause. So *Ocampo's* comment that determining probable cause for "arrest" may be delegated to a quasi-judicial officer does not mean that the decision to arrest forecloses judicial review prior to trial.[17] Even a search warrant, issued by a judicial officer may be reviewed prior to trial in an adversary setting. Yet the Government would have us believe that liberty, taken by a prosecutor's *ex parte* information and the warrant that issues thereafter is beyond scrutiny until trial. No case supports that proposition.

[17]The Government's misunderstanding of this distinction is apparent thoughout their brief. Thus they quote cases which are inapposite. For instance, *United States ex rel. Hughes v. Gault*, 271 U.S. at 149:

> "The Constitution does not require any preliminary hearing *before* a person charged with a crime against the United States *is brought* into the court having jurisdiction." (Emphasis supplied.)

Government Brief 29-30, n. 25;

and *United States v. Bland*, 472 F. 2d at 1337:

> "We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing *before the prosecutor can exercise his ago-old function* of deciding what charge to bring against whom." (Emphasis supplied.)

Government Brief 42, n. 36.

The error is perpetuated to the end of their Brief when they utilize *Calero-Toledo v. Pearson Yacht Leasing*, ___ U.S. ___, 94 S. Ct. 2080 (1974). The taking without a hearing in that case was necessary to assert jurisdiction over the boat before it was removed from the jurisdiction. We have no quarrel with that process as long as there is a chance for early subsequent review.

B. History.

The historic purpose of the preliminary hearing remains unchanged today:

> "The object or purpose of the preliminary [hearing] is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."
>
> *Thies v. State*, 178 Wis. 98, 189 N.W. 539, 541 (1922).

The emergence of public prosecutors in the United States did not render preliminary hearings superfluous. Every state provides for such hearings. Respondents' Brief, App. 1a - 2a. From the amicus curiae briefs filed in this case, it appears that they are both used and useful. While the prosecutor has "provided a new and professional medium of screening" as the Government submits, there is no reason to think he has supplanted preliminary hearings. His function is complemented by a preliminary hearing which permits an opportunity to be heard.

It would be ironic if the *ex parte* prosecutorial determination were now considered to obviate the impartial probable cause inquiry which gradually evolved in England, merely because the English inquiry preceded the formal charge. That would result in a step backwards and yet the Government argues for it: The

preliminary hearing is emptied of its normal and traditional purpose if it is held after the filing of . . . an information". Government Brief 28.

It appears that only a handful of states agree with that proposition. "In most jurisdictions an information may not be filed unless a judge is convinced that probable cause exists." Katz, *Justice is the Crime, Pretrial Delay in Felony Cases* 17 (1972) (footnote omitted). The caution is well founded:

> "Evidence exists from the reign of Edward I that the king, through his legal representatives, the sejeant of treason or the sejeant of felony (forerunners of the modern prosecutor) accused persons of felony or misdemeanor cases in the Court of The Star Chamber and thus avoided the grand jury."
>
> *Id*, Katz at 16:
>
> "The information procedure was eventually misused by Crown officials through malicious prosecutions. This abuse was remedied by the Statute of 4 Will. & Mary, c. 18 (A.D. 1692) which forced the Master of the Crown Office into a proceeding with a magistrate. 1 J. Stephen, *A History of the Criminal Law of England*, 294-97 (1883)."
>
> *Id* at 16-17, n. 34.

We imply no malice in present day prosecutors. But history does suggest that any secret, *ex-parte* determinations made by police and prosecutors which substantially affect a person's right to liberty, ought to be open to subsequent judicial review.

By asking that this Court clothe informations with sanctity until trial, the Government is seeking a radical

enlargement of prosecutorial powers throughout the United States. We submit that their arguments must be rejected.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

1a

A COMPARISON OF INTERESTS RELEVANT TO DUE PROCESS DETERMINATIONS

CASE	THE RIGHT INVOLVED	THE DEFENDANT'S CLAIM TO THE LIBERTY OR PROPERTY	THE HARM CAUSED TO DEFENDANT BY VIRTUE OF THE DEPRIVATION	THE OPPOSING PARTY'S INTEREST IN THE TAKING	WAS THERE JUDICIAL SUPERVISION OF TAKING UNDER ATTACKED STATUTORY SCHEMES?	IS THERE JUDICIAL SUPERVISION OF TAKING UNDER SUPREME COURT DECISION?	THE METHOD OF REGAINING LOST INTEREST FOR THOSE FINANCIALLY ABLE	PREREQUISITES FOR TAKING UNDER ATTACKED SCHEME	THE REMEDY FOR IMPROVIDENT TAKING	PRESENT PROCEDURES AVAILABLE TO PRELIMINARILY TEST THE VALIDITY OF THE TAKING	STATE'S OBJECTION TO PROVIDING PROMPT PRELIMINARY HEARINGS DEMANDED BY THE DEFENDANTS	IS ATTEMPTED DEPRIVATION BASED UPON UNDERLYING WRITTEN AGREEMENT?
Gerstein v. Pugh	Liberty	Absolute	Loss of Freedom; possible loss of job, reputation; possible physical or emotional injury in jail	To assert Jurisdiction for trial (continued physical custody not essential)	No	----	Bond, at discretion of judicial official	Arrest, filing of information (or information, arrest)	None	None	Economy and efficiency	No
Mitchell v. W.T. Grant	Property	Conditional	Loss of use of stereo, stove, refrigerator, washing machine	To recover property and protect against loss or depreciation pending trial	Yes	Yes	Absolute right to regain property through posting of bond.	Demand and bond	Action against bond; availability of attorneys fees and damages for injury to social standing reputation, humiliation and mortification.	Immediate post-deprivation adversarial hearing upon request	Economy, efficiency, protect creditors' rights to property	Yes, signed conditional sales contract
Fuentes v. Shevin	Property	Conditional	Loss of use of stereo and stove	To recover property and protect against loss or depreciation pending trial	No	Yes	Absolute right to regain property through posting of bond.	Demand and bond	Action against bond	Automatic prior hearing	Economy, efficiency, protect creditors' rights to property	Yes, signed conditional sales contract
Sniadach v. Family Finance Corporation	Property	Absolute	Loss of up to 50 percent of wages	To insure payment of alleged debt	No	Yes	None	Demand and bond	Action for return of money	Automatic prior hearing	?	Yes, signed promissory note
Morrissey v. Brewer	Liberty	Conditional	Loss of freedom; possible loss of job; possible physical or emotional injury in jail	To impose punishment upon convicted defendant	Initially, at sentencing, yes. Thereafter, no.	No, although a neutral and detached arbiter is required.	None	Adjudication, sentence, parole, rearrest	Habeas corpus	Automatic subsequent adversarial hearing after arrest	Economy, efficiency	Yes, parole agreement (not clear if signed)
Gagnon v. Scarpelli	Liberty	Conditional	Loss of freedom; possible loss of job; possible physical or emotional injury in jail	To impose punishment upon convicted defendant	Initially at sentencing, yes. Thereafter, no.	No. although a neutral and detached arbiter is required.	None	Adjudication, sentence, probation, rearrest	Habeas corpus	Automatic subsequent hearing after arrest (ability to cross-examine witnesses depends on geographical circumstances)	Economy, efficiency	Yes, signed probation agreement